

Decision **DRAFT DECISION OF COMMISSIONER CHONG**
(Mailed 2/10/2006)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking concerning
Broadband Over Power Line deployment by
electric utilities in California.

Rulemaking 05-09-006
(Filed September 8, 2005)

**OPINION IMPLEMENTING POLICY ON
BROADBAND OVER POWER LINES**

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OPINION IMPLEMENTING POLICY ON BROADBAND OVER POWER LINES

I. Summary

With this decision we adopt a regulatory framework that fosters competition in the broadband market by giving regulatory certainty to California companies seeking to provide broadband over power lines (BPL). The framework adopted today provides the needed regulatory certainty so that BPL can provide Californians with a new “wired” broadband pipe to the home, which can provide additional competition in the broadband market. Also, BPL has the potential to meet the goals of Section 706 of the Telecommunications Act of 1996¹ by promoting universal access to broadband services. Through new “smart grid” technologies, BPL also may improve reliability of electrical systems and decrease California consumers’ energy expenses.

The regulatory framework adopted today protects electric ratepayers from the business risks associated with BPL, aligns shareholder risks and rewards, and provides benefits to ratepayers. Specifically this decision: (1) allows third-parties or electric utility affiliates (subject to our existing affiliate reporting requirements) to provide BPL services; (2) protects ratepayers and aligns financial risks and rewards; (3) adopts a mechanism for sharing any additional revenues received from BPL providers; (4) provides non-discriminatory access to utility poles and rights of way for BPL and other broadband providers via our existing pole attachment and right-of-way rules; (5) maintains the safety and reliability of the electric distribution system; and (6) adopts a policy of exempting

¹ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996), at Section 706.

BPL-related transactions, with conditions, from the requirements of Pub. Util. Code § 851 pursuant to our authority under Pub. Util. Code § 853(b).

A. BPL Provides High Speed Digital Communications Over Existing Power Lines

In this decision, we principally discuss what the Federal Communications Commission (FCC) calls “Access BPL” systems, which carry high speed data signals to neighborhoods from a point where there is a connection to a telecommunications network.² BPL data is transmitted at a much higher frequency than electricity, so the BPL signal can occupy the electric wires without interfering with electric transmission. The power delivery system does, however, potentially interfere with the BPL signal. A variety of BPL technologies have been developed to address these technical challenges.³

² “BPL” in this decision refers to “Access BPL” as defined by the FCC: “A carrier current system installed and operated on an electric utility service as an unintentional radiator that sends radio frequency energy on frequencies between 1.705 MHz and 80 MHz over medium voltage lines or low voltage lines to provide broadband communications and is located on the supply side of the utility service’s points of interconnection with customer premises.” *In the Matter of Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems*, ET Docket No. 04-37, and *Carrier Current Systems, including Broadband Over Power Lines*, ET Docket 03-104, FCC No. 04-245, Report and Order, (rel. Oct. 28, 2004) at para. 29 (FCC R&O):

³ “Within a residential neighborhood, some system implementations complete the connection between the medium voltage lines and subscriber homes or businesses by using wireless links. Other implementations employ a coupler or bridge circuit module at the low-voltage distribution transformers to transfer the Access BPL signals across (thereby bypassing) these devices. In such systems, the BPL signals are brought into homes or businesses over the exterior power supply cable from the coupler/bridges, either directly, or via Access BPL adaptor modules. Typically, the medium voltage lines are carried overhead on transmission poles or tower mountings; however, in a large number of locations, and in newer subdivisions and neighborhoods, these lines are

Footnote continued on next page

B. Benefits of BPL

1. BPL Provides an Opportunity to Increase Broadband Competition

This Commission is taking the proactive step to set up a “BPL-friendly” regulatory framework because of our belief that BPL has the clear potential to bring valuable, additional competition to the California broadband market. At present, the California broadband market is principally dominated by digital subscriber line (DSL) service on conventional phone lines and cable modem services over upgraded cable television lines.⁴ This Commission believes that more broadband competition will bring lower prices, innovative services, and the potential for new rate plans to consumers.

2. BPL Could Expand Broadband Access to More Californians

BPL has the potential to provide a new broadband pipe to California’s communities because existing electrical wires run to each home and business (the so-called critical “last mile”). Thus, electric utilities own valuable rights-of-way to consumers. The nation’s power grid may be an untapped resource to provide another path for the delivery of broadband service to citizens.

Based on our review of current technology, technical and economic constraints may initially limit the potential of BPL to serve dispersed populations

enclosed in underground conduits and the distribution transformers are mounted above ground on a pad, inside a metal housing.” (FCC R&O, at para. 6.)

⁴ Other broadband competitors include dedicated high speed lines, unlicensed wireless Internet access services, and fixed and mobile radio services.

in rural areas.⁵ We believe, however, that technology advances where there is a need. New strides in BPL technology soon may bring additional advanced broadband services to underserved areas in California. In general, we believe that increasing the number of broadband delivery platforms and facilitating broadband competition is one of the best ways to extend broadband access to rural areas. While some broadband providers may focus on urban markets, it is conceivable that others may adopt a business plan to serve niche markets which may include rural or other underserved communities. The support given for rapid BPL deployment by rural electric and telephone utilities in the FCC's BPL rulemaking reaffirms this potential.⁶ By encouraging new facilities-based broadband platforms in our state, the Commission will enable our state to continue as a technology leader.

3. BPL Provides Reliability and Cost Savings to Electricity Consumers

BPL technology also can provide benefits to electrical customers by enabling valuable "smart grid" applications that could improve electrical system reliability and support the implementation of money-saving energy management systems. Potential utility applications include automatic meter reading, voltage control, equipment monitoring, remote connect and disconnect, power outage

⁵ See Report of the Broadband Over Power Lines Task Force, the National Association of Regulatory Utility Commissioners (Feb. 2005) (NARUC Report), at p.13.

⁶ The National Rural Telecommunications Cooperative and the National Rural Electric Cooperative Association filed joint comments supportive the goal of rapid BPL development. (FCC R&O, at para. 14.)

notification and the ability to collect data on time-of-day power demand.⁷ We strongly encourage electric utilities to study BPL as a way to provide “smart grid” applications to California consumers.

C. Federal and State Agencies Have Recognized BPL’s Potential

Federal regulatory agencies and a number of forward-looking state agencies have recognized BPL’s potential and adopted policies to address key regulatory issues. The FCC’s Report and Order noted that “this new technology offers the potential to give rise to a major new medium for broadband service delivery.”⁸ In its Report and Order, the FCC issued a change to its Part 15 rules for measures to mitigate radio interference caused by BPL. In general, BPL must operate on a noninterference basis relative to wired services.⁹

On October 14, 2004, the Chairmen of the FCC and the Federal Energy Regulatory Commission (FERC) issued an unusual joint statement, stating that “national policies should facilitate rapid deployment of all broadband technologies, including BPL”¹⁰ They agreed that “[p]olicymakers at all levels

⁷ NARUC Report, at 13-18. “The term ‘smart grid’ refers to an electricity transmission and distribution system that incorporates elements of traditional and cutting-edge power engineering, sophisticated sensing and monitoring technology, information technology, and communications to provide better grid performance and to support a wide array of additional services to consumers.” NARUC Report, at 13.

⁸ FCC R&O at para. 13.

⁹ *Id.*, at para. 2.

¹⁰ NARUC Report, at 2.

should coordinate their efforts to promote a minimally intrusive policy framework for such technologies.”¹¹

The National Association of Regulatory Utility Commissioners (NARUC) convened a BPL Task Force in December 2003 to examine the potential of BPL and issued a report in February 2005. The NARUC BPL Task Force noted that “it will be primarily up to individual states to tailor appropriate regulatory roadmaps and responses.”¹² The Task Force members also agreed that the regulatory issues surrounding broadband technologies should be encouraged through a “minimally intrusive approach,” and that “the long term resolution of the various outstanding issues should not favor any technology over another.”¹³

Individual states have begun addressing the regulatory issues surrounding BPL. Recent legislation in Texas addressed many of the most important regulatory issues slowing BPL deployment in that state.¹⁴ Similarly, on January 25, 2006, the New York Public Service Commission initiated a proceeding to identify and address key regulatory issues.¹⁵ This Commission recognized the need to provide regulatory certainty to encourage the

¹¹ *Id.*

¹² *Id.*, at 3.

¹³ *Id.*, at 4.

¹⁴ See TX S.B. No. 5, Use of Electricity Delivery System for Access to Broadband and Other Enhanced Services, Including Communications, § 43.001(c) (2005).

¹⁵ New York State PSC, Case 06-M-0043, Proceeding on Motion of the Commission to Examine Issues Related to the Deployment of Broadband over Power Line Technologies, effective 1/25/06..

deployment of BPL to our citizens, and issued an Order Instituting Rulemaking (OIR) on September 8, 2005.¹⁶

D. Goal of Decision is to Provide Regulatory Certainty to Attract BPL Investment

Electric Power Research Institute (EPRI) noted in its BPL White Paper that “regulatory action or inaction could have a significant impact on the business case for BPL, pointing to the need for a proactive approach with regulators on this issue.”¹⁷ At present, the Commission is only aware of one BPL pilot program in California, which is SDG&E’s pilot program in San Diego, California that commenced on September 1, 2005. This limited deployment is in contrast to greater levels of activity within states where policymakers have addressed the regulatory issues surrounding BPL.¹⁸ We have heard from utilities and BPL providers that the cloud of regulatory uncertainty may be causing them to decide not to initiate projects in California.

When Governor Schwarzenegger recently proposed his comprehensive infrastructure investment plan, he emphasized that “[o]ur plan must not only expand the concrete highways that connect Los Angeles to San Francisco and Stockton-but the digital ones that connect Stockton to Shanghai, Sydney and

¹⁶ Order Instituting Rulemaking concerning Broadband Over Power Line Deployment by Electric Utilities in California, Rulemaking (R.) 05-09-006 (September 8, 2005).

¹⁷ Broadband Over Powerline 2004: Technology and Prospects. EPRI White Paper, November 2004, p. 3.

¹⁸ TXU and Current Communications to Create Nation's First Multipurpose Smart Grid, TXU Corp. and Current Communications Group News Release, December 19, 2005. See <http://www.txucorp.com/media/newsrel/detail.aspx?prid=916..>

Seoul.”¹⁹ To that end, today this Commission is taking the initiative to establish a BPL-friendly regulatory framework to ensure that we have the most advantageous regulatory climate to attract major infrastructure investment in California’s broadband infrastructure.

E. Proposed Regulatory Framework Protects Ratepayers, Aligns Shareholder Risks and Rewards and Provides Ratepayer Benefits

We believe that the regulatory framework in this decision protects ratepayers from the business risks associated with investment in BPL and protects the reliability and safety of the electric system. At the same time, we align shareholder risks and rewards in order to provide incentives for utility shareholders to take the financial risks associated with negotiating arrangements with BPL developers or developing a BPL system themselves through an affiliate.

II. Procedural Background

The Commission adopted an OIR concerning Broadband Over Power Line Deployment by Electric Utilities in California on September 8, 2005. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) were identified as Respondents. Parties were ordered to file opening comments on the issues identified in the OIR by October 6, 2005 and reply comments by October 17, 2005. The Commission also preliminarily determined that there was no need for evidentiary hearings in

¹⁹ State of the State Speech by California Governor Arnold Schwarzenegger, January 5, 2006. See http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp.

this proceeding. Parties that believed evidentiary hearings were required had to file a motion requesting such a hearing by October 6, 2005.

On September 29, 2005, The Utility Reform Network (TURN) filed a motion requesting that the deadline for comments be extended by at least four weeks, and that the deadline for requesting evidentiary hearings be changed from concurrently with initial comments to concurrently with reply comments. An Administrative Law Judge's ruling granted these requests and extended the deadline for opening comments to November 3, 2005, and extended the deadline for reply comments to November 15, 2005. The deadline for requesting evidentiary hearings was moved to November 15, 2005.

Opening comments were received on November 3, 2005. The parties that filed comments in this proceeding are Ambient Corporation, CCTA, the California ISP Association (CISPA), Californians for Renewable Energy (CARE), the City of Cerritos, the City and County of San Francisco, Current, CTIA – The Wireless Association (CTIA), Disability Rights Advocates, Greenlining, PG&E, SDG&E, SCE, TURN, Time Warner Telecom of California, the United States Department of Defense and All Other Federal Executive Agencies and the Utility Consumers' Action Network (UCAN).

PG&E, SCE, California Cable and Telecommunications Association (CCTA) and Current Communications (Current) filed a joint motion requesting a 20-day extension of time to file reply comments. TURN supported the joint motion, and SDG&E opposed the motion. The administrative law judge (ALJ) extended the deadline for filing reply comments and requests for evidentiary hearings to November 22, 2005.

Parties filed reply comments on November 22, 2005. Californians for Renewable Energy (CARE), Disability Rights Advocates, the Division of Ratepayer Advocates (DRA) (then known as the Office of Ratepayer Advocates), the Greenlining Institute (Greenlining) and TURN filed motions requesting evidentiary hearings.

On November 21, 2005 the ALJ issued a Notice of a Pre-Hearing Conference to be held on December 8, 2005 to determine the parties, positions of the parties, issues, and other procedural matters.

One important procedural issue is whether evidentiary hearings are necessary in this proceeding. Pub. Util. Code § 1701.1(a) provides that the Commission, “consistent with due process, public policy and statutory requirements, shall determine whether a proceeding requires a hearing. After reviewing the issues relevant to this decision, we hold that evidentiary hearings are not needed in this proceeding. This conclusion is supported by the ALJ and Assigned Commissioner.

Our decision not to hold evidentiary hearings is consistent with our decision in *In Re Competition of Local Exchange Service* (1995) 61 CPUC2d 597, 601. In that decision, the Commission addressed the issue of whether and when due process considerations require evidentiary hearings:

Due process is the federal and California constitutional guarantee that a person will have notice and an opportunity to be heard before being deprived of certain protected interests by the government. Courts have interpreted due process as requiring certain types of hearing procedures to be used before taking specific actions.

The California Supreme Court has laid down a simple rule regarding the application of due process. According to the Court, if a proceeding is quasi-legislative, as opposed to quasi-judicial, there are no vested interests being adjudicated, and therefore, there is no

due process right to a hearing. (Citing *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 901; *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292.)

Pursuant to this analysis, the Commission in *In Re Competition of Local Exchange Service* decided that evidentiary hearings were not required, because the proceeding at issue was quasi-legislative. Similarly, this proceeding is not a quasi-judicial matter which requires a hearing. We do not part from our preliminary categorization, and maintain that this proceeding is quasi-legislative proceeding. No vested interests of any party are being adjudicated. Also, no party other than TURN challenged the Commission's preliminary categorization.²⁰

Furthermore, the record provides no persuasive reason to depart from our preliminary conclusion that there is no need for evidentiary hearings. The issues in this proceeding, for the most part, involve policy and legal conclusions that have been addressed in briefs. Also no party has demonstrated a disputed material issue of fact that would affect our deliberations. (See Prehearing Conference (PHC) transcript, at 15-16.)

²⁰ TURN objected to a preliminary determination exclusively deeming this proceeding as quasi-legislative, suggesting instead a bifurcated proceeding in which policy issues would be deemed quasi-legislative in a first phase of the proceeding and that fee issues (if any) be deemed adjudicative in a second phase of the proceeding. Our decision today does not set fees, instead making them subject to negotiation between BPL providers and utilities. We decide related § 851 issues on a policy basis. Accordingly, we decline to adopt TURN's suggestion.

III. Utility Affiliate Participation

A. Summary

Our primary goal in this proceeding is to speed the deployment of BPL technology. In order to permit energy utilities to deploy BPL in a variety of ways, we will allow the participation of utility affiliates in the provision of BPL services. This decision, however, recognizes that limits should be placed on affiliates' provision of BPL services, so that we ensure there is no cross-subsidization from ratepayers to the utility affiliates.

Based upon the state of the record in this proceeding, policy and law indicate that the Commission's existing Energy Affiliate Transaction Rules set forth in D.97-12-088, as modified by D.98-08-035, do not apply to transactions between a BPL affiliate and its regulated electric utility affiliate since the BPL affiliate does not offer "energy-related" products or services as currently defined by those rules. This conclusion is consistent with the preliminary intention stated in the OIR that the Energy Affiliate Transaction Rules do not apply.

B. Nature of BPL Provider

As a threshold question, we need to determine who is allowed to provide BPL services. The possibilities that have been raised in this proceeding include third parties, utility affiliates, and the energy utilities themselves.

The provision of BPL services by an independent third party has sometimes been referred to as the "landlord-tenant" model, with the energy utility acting as the landlord and owner of the facilities (i.e. the power lines), and the third party actually providing the BPL service. The utility and third party BPL provider would negotiate a contractual arrangement by which the BPL

provider would obtain access to the necessary utility infrastructure in exchange for some form of value flowing to the utility.²¹ The OIR clearly contemplated this as a possible model, the non-utility BPL providers (e.g. Ambient and Current) clearly prefer this model, and there was widespread support for this model.²² For example, SCE states: “We also agree with the Commission’s decision to promote a “landlord” model for electric utilities. At this point, SCE lacks the personnel and expertise to become a BPL provider itself. . . The “landlord” model allows SCE to concentrate on its core business activities and shift responsibility and risk from the company to third parties.” (SCE Opening Comments, p. 1.)

As TURN points out, the landlord-tenant model offers a number of advantages, including alignment of ratepayer and shareholder incentives, access to BPL providers’ technical and marketing expertise, true arms-length contract negotiations, minimizing the need for regulatory oversight, and providing the greatest potential ratepayer benefits. (TURN Opening Comments, pp. 5-8.) Accordingly we will allow BPL services to be provided by independent third parties.

The question of whether BPL services should be allowed to be provided by utility affiliates was more contentious. The energy utilities generally appear supportive of allowing affiliate participation, although SCE indicated that it was not currently interested in having an affiliate provide BPL services. (PHC Transcript, p. 5.) PG&E and SDG&E, while responding to the OIR’s call for comments on which affiliate rules should apply (see, e.g. PG&E Opening

²¹ The parties disagreed as to what an energy utility could reasonably expect in return in addition to pole access fees.

²² Greenlining does not support the landlord-tenant model. (PHC Transcript, p. 21.)

Comments, pp. 6-7; SDG&E Opening Comments, pp. 15, 23), also stated that they did not currently have plans to offer BPL services through affiliates, but would evaluate their options in light of what the Commission decides in this proceeding. (PHC Transcript, pp. 8-9.)²³ As Current put it, “[B]ased upon the comments filed by the utilities in this proceeding, it is not clear that any BPL deployments will involve affiliate transactions.” (Current Reply Comments, pp. 3-4.)

On the other hand, concerns about utility affiliate provision of BPL services were advanced by TURN, UCAN, DRA, Disability Rights Advocates, Time Warner Telecom, and CISPA. Most of these concerns are rather generalized. Although TURN argues that if the BPL vendor was a utility affiliate, that the “incentive compatibility between ratepayers and shareholders” that exists under the landlord-tenant model would be lost. According to TURN, this is because “[t]he utility would lack the financial incentive to make the best possible deal in terms of maximizing lease payments, because those payments would have to be shared with ratepayers, while profits remaining with the affiliated BPL vendor would flow directly to the shareholders of the parent holding company.” (TURN Opening Comments, p. 8.)

TURN may be correct, but the possibility of “financial shell games” of this sort is not unique to the provision of BPL, but rather is inherent in the context of a parent company consisting of both a regulated utility and unregulated affiliates. In the past, the Commission has chosen to allow regulated utilities to have unregulated affiliates, and to address concerns about the relationship

²³ SDG&E does, however, appear to be interested in the possibility of providing BPL service through an affiliate. (PHC Transcript, pp. 35-37.)

between the regulated and unregulated sides via affiliate transaction rules. Accordingly, it is more consistent with Commission practice to allow participation of utility affiliates in the provision of BPL, subject to our affiliate transaction rules, as opposed to prohibiting an unregulated affiliate from engaging in a particular kind of business.

Given that BPL is a nascent technology we simply do not know whether the landlord-tenant or the utility affiliate approach will best expedite the rapid deployment of BPL. Despite the utilities' apparent ambivalence toward offering BPL via affiliates, it may ultimately prove to be the fastest way to deploy BPL, and we do not want to preclude that possibility. Accordingly, we will allow the participation of utility affiliates in the provision of BPL services.

Finally, it is possible that the regulated energy utilities could themselves provide BPL services, either as a tariffed (above the line) or non-tariffed (below the line) service. The tariffed utility service approach is supported by Greenlining, but there otherwise appears to be little interest in the utility itself being the BPL provider, and the OIR did not address it. Accordingly, the record is scant on direct utility provision of BPL services. Direct utility provision of BPL will not be governed by the approach we adopt in this decision. Rather, should a regulated energy utility wish to provide BPL service on a tariffed or non-tariffed basis, it should seek Commission approval to do so under existing Commission procedure.

C. Affiliate Rules

Since we are allowing utility affiliate participation in the provision of BPL services, we need to determine which affiliate rules are most appropriate. In the OIR that created this proceeding, we indicated our preference regarding how affiliated relationships of the utility and the BPL provider should be treated.

“To ensure that transactions between a utility and its affiliate do not harm ratepayers or subsidize BPL affiliates to the detriment of broadband competition, utility transactions with BPL affiliates would be subject to the same rules as a telephone utility’s transactions with a DSL affiliate, as set forth in D.93-02-019. Transactions between the utility and its BPL affiliate would not be subject to the Affiliate Transaction Rules governing conduct between energy utilities and their energy affiliates since BPL is a communications platform that does not provide products that use electricity, or services that relate to the use of electricity.^{24,25} (OIR at 11.)

The rules adopted by the Commission in OIR 92-08-008 and D.93-02-019 are rules governing the reporting of transactions between electric, gas, and telephone utilities and their affiliates, and would apply to transactions between a utility and an affiliate engaged in communications-related businesses.

The OIR’s preliminary conclusion that the Energy Affiliate Transaction Rules would not apply to a BPL affiliate is supported by SDG&E and Ambient, while applying the Energy Affiliate Transaction Rules is supported by PG&E and SCE.²⁶ PG&E and SCE argue that as energy utilities, they are familiar with the Energy Affiliate Transaction Rules, have employees trained to comply with those

²⁴ The Commission adopted Affiliate Transaction Rules in D.97-12-088, modified by D.98-08-035, and further clarified by D.98-11-027.

²⁵ This is consistent with D.00-06-019, in which the Commission concluded that the energy Affiliate Transaction Rules did not apply to transactions between a communications utility affiliate and the regulated utility since the communications affiliate did not offer “energy-related” products or services.

²⁶ DRA, TURN, and Current also question the OIR’s preliminary determination that the Telco Affiliate Rules would apply to BPL.

rules, and have compliance and reporting systems in place under those rules. (See, e.g. PG&E Reply Comments, pp. 13-14.) They also disagree with the conclusion of the OIR that the Energy Affiliate Transaction Rules are inapplicable because BPL is a communications platform, and is not a service “that relates to the use of electricity.” (SCE Opening Comments, p.8; PG&E Reply Comments, p.14.)²⁷

Based on the record of this proceeding, it is clear that the Commission was correct in its assertion that BPL is a communications platform that does not provide products that use electricity, or services that relate to the use of electricity. While it is true that BPL uses the electric lines to send information from one point to another, this is different than a service that relates to the use of electricity. In its comments, Current states that, “In the area of utility applications, BPL enables utilities to implement enhanced power distribution services such as automated meter reading, automated power outage and restoration detection, power quality monitoring, load management and demand side management.” (Current Opening Comments, p. 2.)²⁸ These are utility

²⁷ The applicable language defining the scope of the Energy Affiliate Rules reads:

II.B. For purposes of a combined gas and electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity, unless specifically exempted below. For purposes of an electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity. For purposes of a gas utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or the provision of services that relate to the use of gas.

²⁸ Current expands on this in some detail, and introduces its discussion by stating:

Footnote continued on next page

applications that are made possible by the communications network that BPL will provide and are undoubtedly different than providing electric service to retail or wholesale customers.

SDG&E argues that applying the Energy Affiliate Transaction Rules to a potential BPL affiliate would place that affiliate at a competitive disadvantage in the broadband market, as it would be not only a new entrant, but would also be subject to different rules than DSL providers. (SDG&E Reply Comments, pp. 20-21.) According to SDG&E, for there to be a level playing field in the broadband market, BPL affiliates should not be subject to the Energy Affiliate Transaction Rules. (*Id.*)

“Electric distribution utilities can use BPL to improve their distribution networks in a variety of ways. For example, BPL will provide for more efficient and reliable distribution networks by enabling electric utilities to obtain information in real time from designated points along their distribution networks (e.g. substations, capacitor banks, switches, transformers and voltage regulators) and to transmit the information to their back-office systems, thus providing an “intelligent” power distribution network. The benefits of such an intelligent network can be enormous. As one investor report explains, “distribution utilities may find that a BPL-enabled grid offers compelling savings in operation, maintenance and construction cost.” A second report adds that “BPL offers utilities upside ROI [return on investment] over time in incremental revenue streams, operational savings, efficiencies and productivity from turning ‘dumb’ electrical networks into ‘smart’ digital networks.” Utilities are exploring BPL for just these reasons, and the Commission’s proposed rules would facilitate utilities ability to develop and deploy in wide scale the BPL applications they desire. The Electric Power Research Institute (“EPRI”) estimates that a smart electricity system could increase productivity by 0.7% per year, leading to a \$3 trillion increase in GDP by 2025. Indeed, the largest benefits of BPL may very well stem from what CURRENT calls Enhanced Power Distribution Service (“EPDS”) functions, some of which are described below.” (*Id.*, pp. 10-12, footnotes omitted.)

SDG&E's policy argument is well founded. Telecommunications utilities are not governed by the Energy Affiliate Transaction Rules. Providers of DSL that are affiliated with telecommunications utilities are not subject to the Energy Affiliate Transaction Rules and we see no reason to apply a different set of rules solely because the regulated company that is affiliated to BPL is an energy company.

SDG&E, in response to a question from the assigned ALJ at the PHC, identified one specific concern regarding the use of the Energy Affiliate Transaction Rules. Counsel for SDG&E stated:

SDG&E has spent and is spending several million dollars of shareholder money upon on a pilot. Now at this point in time, that's a risky thing to do because the rules are uncertain. Under some interpretations of the affiliate transaction rules that apply in the energy industry, the investment that is now being made by shareholders within the utility, the fruits of that investment could not be utilized by a BPL affiliate if the Commission decides to authorize such a business endeavor. (PHC Transcript, pp. 35-36.)

The thrust of this decision is to create a regulatory environment that is BPL-friendly. SDG&E is the only utility that is currently engaged in a pilot program for BPL. We do not support the application of affiliate rules that would either send a mixed message to a utility that is looking into BPL as a potential investment as this uncertainty is exactly what we sought to avoid in the OIR. SDG&E's particular concern is valid and one more reason why the Energy Transaction Affiliate Rules are not appropriate for BPL services.

We also do not agree with PG&E and SCE that because they currently have staff trained to comply with the Energy Affiliate Transaction Rules, that these are the more appropriate rules for this service.²⁹ Furthermore, to protect ratepayers from cross-subsidization and prevent anti-competitive behavior, the affiliate reporting requirements need to be coupled with substantive rules that lay out the standards the Commission will apply when reviewing affiliate transactions in the context of a General Rate Case or audit. DRA notes that at the time the affiliate reporting requirements were adopted, the telecommunications utilities were also subject to other substantive affiliate transaction rules contained in utility-specific decisions. (ORA Opening Comments, pp.15). In D.00-06-019, which concluded that the Energy Affiliate Transactions Rules would not apply to transactions between Sempra Communications and SDG&E and SoCalGas, the Commission noted that Sempra Energy would still be subject to affiliate-related conditions in its merger decision, D.98-03-073.

For transactions between a utility and BPL affiliate, we adopt the “fair market value” standard proposed by SDG&E (SDG&E Opening Comments, pp.22). When reporting affiliate transactions pursuant to OIR 92-08-008 and D.93-02-019, utilities shall report the methodology used to calculate fair market value. The Commission will apply this standard when reviewing such affiliate transactions in a General Rate Case.

²⁹ Neither PG&E nor SCE has shown current interest in creating an affiliate to provide BPL services and thus choosing the Energy Affiliate Transaction Rules would be of no consequence on their behalf.

IV. Protecting Ratepayers, Aligning Shareholder Risks and Rewards, and Providing Ratepayer Benefits

In the OIR we stated that “the Commission intends to encourage BPL deployment in a manner that does not harm ratepayers.” (OIR, p. 2.) The OIR also proposed that BPL projects should only be financed with shareholder or third party funds and that all financial risks and rewards from BPL projects should accrue to the shareholder or third party investors. (OIR, p. 10.) We reiterate and implement these policy objectives.

A. Protecting Ratepayers

As several parties acknowledge, the ultimate commercial success of any particular BPL deployment is uncertain. SCE, for one, notes the “very real potential [cable modem, DSL, and wireless broadband technologies] have to preempt BPL technology from ever developing into a new source of price and service competition.” (SCE Reply Comments, p.3.) Also, even before commercial deployment, BPL faces technological challenges. Investors in BPL will face these competitive and technological risks. If BPL is commercially unsuccessful, a BPL company could lose significant sums of money. To the extent ratepayers pay for the incremental costs of deploying and operating a BPL network, ratepayers are assuming these financial risks.

As a matter of policy, however, we do not believe ratepayer funds should be invested in BPL. For this reason, ratepayer funds should not be used to research, develop or operate a BPL system unless the expenditures can be justified solely on the basis of utility benefits. Any BPL expenditure that has any

other purpose, such as delivering commercial broadband service, must be financed entirely by utility shareholders or third parties.³⁰

B. Aligning Shareholder Risks and Rewards

Shareholders or third parties will not assume the risks of pursuing BPL deployment without some expectation of rewards. Since it anticipated that BPL projects would only be financed with shareholder or third party funds, the OIR therefore, held that all financial risks and rewards derived from BPL project should accrue to the shareholders or third party investors. (OIR, p. 10.) We adopt that approach today.

Utility shareholders need a financial incentive to pursue BPL projects. Even if utility shareholders are not investing money in the BPL system itself, shareholders still incur a variety of financial risks related to “developing, negotiating or performing its obligations under any contract with a BPL vendor.” (PG&E Opening Comments, p. 9.) Utility shareholders would seem unlikely to incur even these risks without some expectation of financial reward.

One way to provide utility shareholders an incentive to pursue BPL projects is to allow the utility to charge the third party BPL company for access to the utility’s wires, and to apply a mechanism by which utility shareholders receive a share of these access fees. To this end, the OIR proposed that a percentage allocation be defined that shares access fees between shareholders and ratepayers. The OIR goes on to state that “the allocation should provide

³⁰ Any use of ratepayer funds for BPL-related goods and services justified on the grounds of utility ratepayer benefit, if not specifically pre-approved, will be subject to reasonableness review.

shareholders a strong incentive to pursue BPL projects while also providing direct financial benefits to ratepayers.” (OIR, p.10.)

Upon further review, we conclude that access fees may be a useful way to provide incentives to shareholders, and, we do not want to preclude the electric utility from receiving access fees.³¹ Monetary compensation from the BPL company to the electric utility may or may not be a component of the contractual relationship between a utility and a BPL company.

We conclude, however, that we should not require BPL companies, whether affiliated or unaffiliated, to pay access fees to a utility. We do not agree with Current’s proposal that we adopt a rule similar to that adopted by the Texas legislature, which would restrict utilities from receiving compensation beyond pole attachment fees. (Current Opening Comments, p.19, citing Texas Public Utility Regulatory Act Sec. 43.102(b).) Current believes that pole attachments fees are adequate to compensate the utility for use of its structures. We view the issue differently. We want to allow the utility and BPL company to agree to appropriate access terms in a manner that gives utility shareholders an incentive to enter into negotiations with potential BPL developers, and accordingly we will not circumscribe the scope of outcome of those negotiations.

C. Providing Ratepayer Benefits

DRA has suggested that the Commission’s BPL regulatory framework should focus on providing direct financial benefits to ratepayers. We recognize, however, that BPL may provide consumer benefits beyond financial ones.

³¹ SDG&E, however, has already stated that it believes that pole attachment fees should be the “sole compensation” for use of utility poles and wires for BPL. (SDG&E Opening Comments, p. 21, SDG&E Reply Comments, p. 26.)

Indeed, significant consumer benefits of BPL likely will come in the form of utility applications and increased broadband competition and access. The issue we must address, therefore, is how we should attempt to maximize overall ratepayer benefits.

After considering this issue, we conclude that a regulatory policy will ultimately be unsuccessful if it seeks to maximize the flow of dollars to ratepayers by asking utility shareholders or third parties to assume the incremental financial risks while apportioning the financial rewards to electric ratepayers. Shareholders and third parties will not put dollars at risk for someone else's benefit, and the ratepayer benefits will never materialize. If BPL does not enter the marketplace, neither the public nor the ratepayers will see any benefit, financial or otherwise.

1. Revenue Sharing

Previously we stated that we would not determine whether access fees or other revenue should be paid by the BPL provider to the utility. Nevertheless, to provide certainty and to avoid future conflicts, we will determine how any such potential additional fees that a utility receives should be divided between utility ratepayers and shareholders. These additional fees at issue in this section do not include standard pole attachment fees, which always flow through to ratepayers.

We have a wide range of proposals to consider, but the field is narrowed considerably by applying the criteria set forth in the OIR, which are that the sharing mechanism should: (1) protect ratepayers from financial risk, (2) align shareholder risks and rewards, and (3) provide direct financial benefits to ratepayers. Many proposals meet one or two of these criteria, but fail at the

remainder.³² On balance, we find SCE's proposed revenue sharing mechanism to best meet all three criteria.

2. Positions of the Parties

Parties proposed a variety of shareholder/ratepayers sharing mechanisms. PG&E proposes to split the after-tax net revenues received by the utility equally between shareholders and ratepayers. (PG&E Opening Comments, pp. 9-11.) PG&E cites a past decision, D.99-04-021, which established that PG&E's after-tax "net revenue" from new non-tariffed products and services should be split 50/50 between ratepayers and shareholders. In the case of BPL, PG&E defines "net revenue" as "gross revenue (not including any revenue from providing service under Commission tariffs such as pole attachment fees) received from a BPL vendor under a contract, net of income taxes and net of incremental costs incurred by the utility in the course of developing, negotiating or performing its obligations under any contract with a BPL vendor" (PG&E Opening Comments, pp.9.)

SCE proposes applying its existing revenue-sharing mechanism for other operating revenues (OOR) as adopted in D.99-09-070. SCE's OOR sharing mechanism would allocate gross revenues based on a 90/10 shareholder/ratepayer split if the non-tariffed product or service is classified as "active," or based on a 70/30 shareholder/ratepayer split if the non-tariffed

³² For example, ORA's proposal protects ratepayers from financial risks and provides direct financial benefits to ratepayers, but does not align shareholder risks and rewards.

product or service is classified as “passive.”³³ SCE’s provision of access to a BPL company would be classified as “active” if it involves incremental shareholder investment of at least \$225,000. (See, D.99-09-070 at pp. 63.)

DRA proposed a mechanism that would limit shareholders’ share of BPL-related revenues to just ten percent of net revenues. (ORA Opening Comment, pp. 12.) Ambient and TURN endorsed sharing mechanisms that are graded over time with a decreasing share of revenues going to shareholders as a BPL project progresses or as time passes following the adoption of this decision. (Ambient Opening Comments, pp. 6 and TURN Opening Comments, pp. 7.) We do not adopt these sharing mechanisms primarily because would not adequately align shareholder risks and rewards

3. Discussion

We agree with SCE that its OOR mechanism protects ratepayers from financial risk. The decision establishing SCE’s OOR mechanism states that “the incremental revenues would be subject to the proposed gross revenue sharing mechanism, while the incremental costs would be borne entirely by shareholders.” (*Id.*, p. 7.) The decision also clearly holds that the framework “insulates the ratepayers from all liability associated with SCE’s product and service offerings, including but not limited to third-party litigation, environmental problems, and the like.” (*Id.*, Ordering Paragraph 3(c)). Together, these protections will protect ratepayers from assuming the financial risks associated with SCE’s contracting activities with a third party BPL company.

³³ SCE’s provision of access to a BPL company would be classified as “active” if it involves incremental shareholder investment of at least \$225,000. (See, D.99-09-070, p. 63.) It appears likely that BPL will be considered “active.”

SCE's OOR mechanism was designed to align shareholder risks and rewards in order to "encourage optimized utilization of utility assets." (*Id.*, Agreement A.) By providing shareholders with ninety percent of gross revenues from "active" non-tariffed products and services, shareholders should receive a large fraction of the rewards in return for the incremental risks they incur because the utility shareholder's 90 percent of revenues must cover all costs. Thus, if the profit margin is slim, the ten percent of gross revenues going to ratepayers could substantially reduce or even eliminate any shareholder profit. Finally, SCE's sharing mechanism provides direct financial benefits to ratepayers in all cases in which gross revenues are positive. In sum, SCE's existing OOR revenue-sharing mechanism satisfies our three criteria. We, therefore, adopt this mechanism for the treatment of any access fees that any electric utility receives in the context of BPL deployment. We do not believe that the proposals of PG&E, DRA, Ambient and TURN sufficiently align shareholder risks and rewards.

V. Access to Poles and Rights of Way

D.98-10-058, Appendix A, referred to as the "ROW Order," contains rules governing telecommunications carriers' and cable TV companies' access to public utility rights of way and support structures. In the OIR we supported using these rules so that they also determine the minimum terms which BPL providers will pay for pole attachments. PG&E and SCE agree that BPL companies should not be granted mandatory access rights to utility rights of way. (PG&E Opening Comments, p.8, SCE Reply Comments, p.15.) No party advocated for mandatory access. We agree that mandatory access rights are not appropriate in this situation.

A. Nondiscrimination

The California Cable and Telecommunications Association (CCTA) notes that the ROW Order requires stricter adherence by telephone utilities than by electric utilities. CCTA goes on to state that “with the emergence of BPL into the marketplace, the Commission must now implement rules that ensure that electric utilities cannot favor their BPL affiliates or partners at the expense of other broadband providers.” (CCTA Opening Comments, p.12-13.) Accordingly CCTA recommends changes to the Commission’s existing rules. (*Id.*)

We recognize that an electric utility’s interest in BPL creates new incentives to discriminate against other broadband providers. However, even without CCTA’s proposed changes, the ROW Order protects telecommunications providers against discriminatory behavior, and we believe this protection is adequate.³⁴ We do not adopt CCTA’s proposed changes.

CCTA also notes that the ROW Order says “electric utilities’ use of its own facilities for internal communications in support of its utility function shall not be considered to establish a comparison for nondiscriminatory access.” (ROW Order). CCTA expresses a concern that an electric utility may blend its internal communications equipment with the BPL system, and therefore a utility’s granting access to itself for its internal communications network would not be subject to the non-discrimination rules in the ROW Order. Since we do not know how the installation of BPL systems will unfold over time, we will not amend this portion of the ROW Order now, but we acknowledge that there may be the potential for discrimination of the sort described by CCTA. Should such

³⁴ A complaint may also be filed with the Commission if the electric utilities practice discriminatory behavior with respect to right of way access.

discrimination occur, we expect that it will be brought to our attention,³⁵ and we can at that time impose an appropriate remedy.

B. Underground Attachments

SDG&E proposes that cost-based formulas should apply if installing a BPL system on underground power lines requires attachment of BPL equipment to the inside or outside of underground or surface transformer enclosures. (SDG&E Opening Comments, p. 10-11 and Appendix A; Current Opening Comments, p. 6.) SDG&E proposes a cost-based formula to calculate attachment fees for the attachment of what it describes as a typical BPL electronics box to the exterior of a typical SDG&E transformer enclosure. (SDG&E Opening Comments, p.10-12 and Appendix A.)

The SDG&E methodology reasonably allocates costs to set an attachment fee. Moreover, based on the record before us, it appears that there are far fewer underground attachments to utility infrastructure than there are pole attachments.³⁶ This record suggests that opportunities for an electric utility to engage in anticompetitive cross subsidies with regards to transformer enclosure attachments is more limited than is the case for pole attachments.

Since SDG&E's cost-allocation methodology is reasonable, is the only detailed proposal in the record and will apply in only a small number of situations, we believe that the SDG&E proposal is reasonable to adopt. We

³⁵ Again, a complaint would be an appropriate vehicle for allegations that an electric utility is abusing the internal communications exemption to discriminate against other companies using or seeking access to electric utility rights of way.

³⁶ For example, according to TURN's table summarizing pole attachment data, only one of the three major electric utilities, SCE, collects revenues from underground attachments. (TURN, Opening Comments, p.29.)

therefore adopt a rate of \$11.20 per year for SDG&E per underground attachment. Other utilities requiring such a rate should submit an advice letter using the methodology described in SDG&E's opening comments, Appendix A.

VI. Use It Or Lose It

PG&E and SCE respond to the OIR's question regarding the possible idling of BPL facilities for anti-competitive purposes by recommending a "use it or lose it approach." As PG&E puts it, "The Commission should adopt rules that require entities that acquire rights to a utility's system for the express purpose of BPL provision to begin implementation and service of BPL within a certain period of time, or forego their rights to do so." (PG&E Opening Comments, p. 6.) PG&E and SCE cite as an example the existing rule that requires a Competitive Local Carrier (CLC) to use space within nine months of the date when a request for access is granted, or be subject to reversion of access to the electric utility. (*Id.*, SCE Opening Comments, p. 7.) Ambient agrees with the recommendation of PG&E and SCE (Ambient Reply Comments, pp. 25-26).

Current and SDG&E, however, criticize the proposal made by PG&E and SCE. Current argues that such fears are unfounded (Current Opening Comments, pp. 22-23). SDG&E argues that imposition of an "artificial deadline" would provide the wrong basis for making decisions regarding BPL deployment. (SDG&E Reply Comments, p. 25.)

While we are not in favor of a competitor's acquiring access to utility infrastructure, only to idle it to gain a competitive benefit, we decline to adopt such a rule here. As SDG&E points out, the technology is changing and developing rapidly, and we do not want to preclude the choice of a slightly more moderate deployment of a significantly better BPL network. The utilities are clearly aware of the possibility of anti-competitive behavior, and can take it into

consideration in their contract negotiations with any BPL providers. We prefer to allow this issue to be addressed in contract negotiations rather than through imposition of a new regulation.

VII. Electrical Equipment Repair and Maintenance

We noted in the OIR that electric equipment problems may be identified in the process of installing a BPL system. The OIR goes on to propose that “costs directly related to the repair and maintenance of existing electrical equipment for the purposes of electric service reliability (e.g., cracked insulators) be allocated to electricity operations. Costs directly related to BPL installation or operation should be allocated to the BPL operator.” (OIR, p.11.) We adopt the OIR’s approach. Costs should be allocated on a cost causation basis.

We expect that this form of cost allocation will not pose any problems for mischaracterization of the nature of the work done. If BPL services are provided by a utility affiliate, it could create an incentive for mischaracterizing the work in order to attain cross-subsidization of BPL by utility ratepayers, but our utility affiliate rules safeguard against such possible abuses. Such issues do not arise in cases where BPL services are provided by a third party.

VIII. Safety and Reliability

The safety and reliability of the electric delivery system is a principal concern of the Commission. Parties observe that BPL poses unique safety issues, since it is attached directly to energized electric wire.

Since the electric utilities continue to be responsible for maintaining high standards of safety and reliability, the utilities should determine whether or not BPL equipment can be installed on their system, who can install the equipment, and how the equipment should be installed and operated.

Moreover electric utilities must continue to comply with the rules, requirements, and standards promulgated by the Commission's General Order (GO) #95, which applies to the construction of overhead lines, and GO #128, which applies to the construction of underground electric supply and communication systems. As previously noted in D.98-10-058, these are minimum standards and the utilities may require additional safeguards and conditions as necessary to ensure safety and service. If in the course of implementing BPL projects utilities identify a need to revise applicable Commission rules or General Orders, the utilities are encouraged to request appropriate relief from the Commission, and the CPUC will address the request expeditiously. Utilities shall ensure that their compliance with the Commission's GO #95 and GO # 128 and their setting and application of additional safeguards and conditions is performed in a competitively neutral manner with respect to other communications and information providers who seek similar access. (OIR, p.12.)

IX. Public Utilities Code Sections 851 and 853(b)

In the OIR, we raised the possibility of exempting BPL transactions from the requirements of Pub. Util. Code § 851, pursuant to our authority under § 853(b).³⁷ (OIR, pp. 5-6.) Some parties applauded this approach, while others

³⁷ Pub. Util. Code § 851 states, in relevant part, that "No public utility...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its...line, plant, system, or other property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it so to do." Section 853(b) reads: (b) The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose

Footnote continued on next page

criticized it. We now confirm that we are adopting a policy of exempting certain BPL transactions from § 851.

A. Party Positions

PG&E supports exempting BPL transactions from § 851 review. It argues that such review is not necessary to protect the public interest and calls § 851 review an “unnecessary regulatory hurdle.” (PG&E Opening Comments, p. 14.) SDG&E concurs: It argues that requiring a § 851 application “necessarily would result in delay and uncertainty.” (SDG&E Opening Comments, p. 20.)

Current and Ambient also support exempting BPL transactions from § 851. As Current puts it, “Sec. 851 proceedings can be contentious and time consuming. Such regulatory uncertainty would substantially hinder the development of BPL and would stand in stark contrast to the Commission’s efforts to promote competition in communications by providing regulatory certainty through appropriate use of Sec. 853 exemptions.” (Current Opening Comments, pp. 23-24.)

TURN, on the other hand, vigorously opposes the proposed exemption from § 851. It contends that an exemption is unnecessary, illegal, and inconsistent with the Commission’s expressly stated standards for granting § 853(b) exemptions. (TURN Opening Comments, pp. 18-26.)

CCTA opposes providing an exemption from § 851 solely for BPL projects too. It argues that such an exemption would be discriminatory and inconsistent

requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers.

with federal law and policy, because the exemption would favor one technology over another. CCTA adds that an exemption is simply unnecessary, as compliance with § 851 will not hinder BPL deployment. (CCTA Opening Comments, pp. 2-8.)

Other parties opposing an exemption from the requirements of § 851 include CISP, DRA, Greenlining, UCAN, and San Francisco.

SCE, while not opposing an exemption from § 851 for BPL, recommends that the Commission “consider a uniform approach to § 851 requirements for all communications providers regardless of the technology on which service is based.” (SCE Opening Brief, p. 6.)

B. Discussion

Public Utilities Code § 851 exists to protect the quality of utility service provided to ratepayers and to protect ratepayers’ investment in utility assets. While it serves an important purpose, § 851 application proceedings can sometimes be both contentious and time consuming, and a full review of every transaction is not always necessary to protect the public interest. Here a lengthy section 851 proceeding would simply be inconsistent with our stated policy goal of not impeding the rapid deployment of BPL technology.

1. Standard for Section 853(b) Exemption

Although previously the Commission has expressed concerns that the granting of § 853(b) exemptions runs the risk that “would create an exception that swallowed the rule,”³⁸ the plain language of § 853(b) does not limit its application to extraordinary circumstances. Section 853(b) provides that “the

³⁸ D.04-08-048, p. 7.

commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest."

Moreover a review of the specific use of § 853(b) to exempt transactions from § 851 shows that the Commission has employed a variety of policies and standards when applying §853(b). Indeed, the Commission has granted a number of exemptions without any finding of extraordinary circumstances.

Often exemptions arise in circumstances that would be difficult to deem "extraordinary" under almost any standard. For example, in D.05-07-039, the Commission granted SDG&E an exemption from § 851 for any contract negotiated with solar photovoltaic or small wind project as long as (i) the contract is the result of an open solicitation, (ii) the agreement meets a least-cost best-fit test, (iii) the contract does not involve an affiliate of SDG&E, and iv) the bidder has access to SDG&E property. In the decision, the Commission lists several reasons for granting the exemption. First, the Commission contends that a section 851 review could "delay implementation." Second, the Commission maintains that the involvement of SDG&E property is "small." Third, the Commission observes that the property would be used "to generate electricity for the utility's customers."

Similarly, in D.05-06-016, the Commission granted PG&E and SCE a § 853(b) exemption from a § 851 review of the transfer of emission reductions to the California Air Resources Board or local air districts. In reaching this result, the Commission simply noted that it has given exemptions in the past where review served no public interest. It further stated that "because PG&E and

Edison will be obtaining the emission reduction from customers solely as a result of the conversion program and the assignment of these reduction will bring about permanent air quality improvements without having any impact on the ability of the two utilities to serve their customers, an exemption from the requirements of § 851, pursuant to § 853(b), is appropriate.”³⁹ This decision does not even consider whether these circumstances are “extraordinary.”

In D.04-03-020, the Commission granted an exemption from § 851 review to the assignment of accounts receivable by Lodi Gas Storage to securitize a short term line of credit. There the Commission observed that the authority granted to it by § 853(b) permitted such an exemption. It further stated that statutes urged the Commission to create competition for gas storage, and the Commission had adopted a “let the market decide” policy for gas storage as a further justification of an exemption.⁴⁰ Once again, the Commission did not discuss whether these are “extraordinary” circumstances.

In D.02-10-008, the Commission, pursuant to §853(b), exempted PG&E’s sales of electric meters to customers. The Commission simply found that “it would be unduly cumbersome and uneconomic to require individual filings by utilities for each individual meter sale. Such a requirement would not serve the public interest.”⁴¹ The decision did not consider whether these circumstances were “extraordinary.”

³⁹ D.05-06-016, 2005 Cal. PUC Lexis 223, 50-51 (Cal. PUC 2005).

⁴⁰ D.04-03-020, 2004 Cal. PUC LEXIS 144, 5-7 (Cal PUC 2004).

⁴¹ D.02-10-008, 2002 Cal. PUC LEXIS 636 (Cal. PUC 2002)

Given this brief review of past Commission decisions, it is clear that TURN is incorrect when it asserts that this Commission has in the past only granted exemptions from § 851 pursuant to § 853(b) in extraordinary circumstances. (TURN Opening Comments, p. 19.) Instead these decisions show that the Commission has granted exemptions in a number of matters where the circumstances are quite ordinary.

In other situations, even when the Commission could have reached a finding of an “extraordinary circumstances,” the Commission did not do so. For example, in D.05-10-013, the Commission granted a § 853(b) exemption from § 851 in order to eliminate the review of a proposed agreement that would allow encroachment on specified easements. Although this exemption was granted during an anticipated energy shortage and the exemption could have readily passed an “extraordinary circumstances” standard, the Commission simply invoked the language of § 853(b) and found that a § 851 approval was “not necessary in the public interest.” In addition to citing § 853(b), the Commission relied on D.01-06-006, which permitted SDG&E to lease space at substations during the energy crisis, once again without finding that “extraordinary circumstances” were present.

Moreover, even when one examines the specific cases in which the Commission cited “extraordinary circumstances” as warranting a § 853(b) exemption, it is clear that the Commission’s notion of “extraordinary” is highly elastic. In D.02-01-055, the Commission exempted the sale of six of PG&E’s electric distribution facilities to customers made twelve years earlier, citing PG&E’s mistake in failing to seek approval as creating an “exceptional circumstance.” The Commission found that the Commission’s implicit approval of the sale (in a prior decision ordering the sale), PG&E’s error, and the passage

of time created “extraordinary circumstances.”⁴² Similarly, in D.04-07-021, the Commission granted PG&E another exemption for 255 similar transactions that likewise had failed to secure approval. After granting an exemption for the entire period preceding the decision, the decision then granted § 851 approval on a going forward basis for all the transactions.

The review of these decisions makes it clear that a § 853(b) exemption may be granted whenever the Commission makes a policy determination that application of § 851 is not necessary in the public interest. As made evident by the plain wording of § 853(b), the Commission need not establish that “extraordinary circumstances” are at issue.

2. Application of Section 853(b)

An exemption in this matter supports a number of important Commission policies, including the following: (i) speedy implementation of BPL systems without lengthy § 851 regulatory proceedings; (ii) providing additional access to new broadband systems to California citizens; and (iii) encouragement of investment in a nascent technology that promises to have both telecommunications and electric grid public benefits. These Commission policies are consistent with goals set forth by the State legislature.

Granting an exemption in this matter is reinforces our policy of encouraging public access to advanced telecommunications services. This Commission policy is stated in § 882(a) of the Public Utilities Codes. The provision states that the Commission shall ensure that “advanced telecommunications services are made available as ubiquitously and

⁴² D.02-01-055, 2002 Cal. PUC LEXIS 7-9 (Cal. PUC 2002)

economically as possible.”⁴³ It also declares that we should aspire “to provide all citizens and businesses with access to the widest possible array of advanced communications services.”⁴⁴

In addition, granting exemption to BPL transactions from review under § 851 will further this Commission’s long-standing goal to promote competition in the broadband market. Public Utilities Code § 709 states that California’s policy for telecommunications is “to remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.”⁴⁵

BPL has the potential to allow the entry of a significant competitor into the broadband market. Requiring electric utilities to undergo lengthy § 851 review would be to create a barrier to entry and thwart the development of a competitive marketplace. Review under § 851 would create a regulatory mechanism where incumbent carriers could seek to delay entry by BPL providers and hence retard the growth of competition in the broadband market. With this delay comes greater uncertainty that will further deter entry. Exemption under § 853(b) of the application of § 851 to these BPL-related transactions is clearly consistent with this policy enunciated by the legislature to reduce barriers to open and competitive markets. Moreover such an exemption is consistent with the precedents established in D.02-10-008 (which exempted PG&E meter sales from review), D.05-07-039 (which exempted photovoltaic and small scale wind

⁴³ Section 882(a) of the Public Utilities Code.

⁴⁴ Section 882(b)(1) of the Public Utilities Code.

⁴⁵ Section 709(g) of the Public Utilities Code

contracts from review), D.05-06-016 (which exempted the transfer of emission rights from review), and D.04-03-020 (which exempted the securitization of receivables by Lodi Storage from review).

Another policy of the Commission is to reduce the level of scrutiny for routine transactions such as those at issue in this proceeding. This policy is reinforced by the existence and language of § 853(b), which broadly allows the Commission to take a hands-off approach when the Commission determines that such a policy is in the public interest.⁴⁶

Moreover, even though a plain reading of the statute does not require that transactions meet a standard of “extraordinary” to merit an exemption, this transaction would meet a Commission “extraordinary” standard regardless. The possibility of bringing another broadband communications channel into the homes of Californians would clearly offer an “extraordinary” opportunity, which specific lengthy § 851 reviews would frustrate. In addition, because individual § 851 proceedings are necessarily fact-specific, we have no way of predicting in advance the issues that may be raised in a particular § 851 proceeding, and accordingly we have no way to predict how lengthy each § 851 proceeding may be.⁴⁷ We prefer to eliminate such regulatory uncertainty and delay and the additional barriers to deploy they create. These considerations, when reviewed in light of our expansive interpretation of “extraordinary” in past Commission

⁴⁶ For example, the Commission’s GO 69-C creates an exemption from § 851 for revocable licenses of utility property that meet certain conditions, and does not require the existence of extraordinary circumstances.

⁴⁷ For example, due process considerations may require evidentiary hearings in some cases.

decisions, establish that the proposed transaction would pass an “extraordinary” standard.

CCTA’s claim that the Commission would improperly discriminate in favor of BPL if it allowed BPL an exemption from §851 is not well founded. Technologies competing with BPL are not identical: They do not provide advanced services in identical manners or by identically-situated entities. For example, Comcast did not need to file a § 851 application at this Commission to provide broadband advanced services over its cable infrastructure, nor did Verizon Wireless need to file a § 851 application to provide wireless broadband service on its licensed radio spectrum. Also, given the head starts of other technologies such as DSL and cable modem service, reducing potential regulatory barriers to the deployment of BPL will actually do more to level the playing field than to tip it.

These considerations lead us to the conclusion that the public interest is best served by the speed of deployment of BPL technologies, rather than by a more rigorous but necessarily lengthy review process of individual BPL-related transactions. Conducting § 851 reviews in this context is not “necessary in the public interest,” and it is both reasonable and consistent with the statutory language of § 853(b) to exempt these transactions from § 851 review.

3. Terms and Conditions Placed on BPL Transactions

Despite the vigor with which the parties debated the merits of § 851 versus § 853(b), the record is sparse on how the Commission should best use § 853(b). Contrary to the tenor of some opponents of the use of a § 853(b) exemption from § 851, the mere use of § 853(b) does not necessarily mean that utilities are given carte blanche to do as they please. Section 853(b) expressly provides that in

granting an exemption from § 851 the Commission may prescribe terms and conditions and establish rules or impose requirements on that exemption.

In this context it is important to address whether, having exempted BPL transactions from Commission review, we should impose conditions to protect the environment. In particular, should we require a review for BPL transactions under the California Environmental Quality Act (CEQA), even though we exercise no discretion in the review of these transactions?

We note that CEQA is a flexible statute, and broad activities associated with California's utility infrastructure already qualify for a categorical exemption from the requirement to conduct a CEQA review. In particular, CEQA Guideline 15301 grants a categorical exemption to a number of "Class 1" activities:

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.

The Guidelines proceed to cite examples specific activities that are categorically exempt from CEQA review:

Examples include but are not limited to:

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

and

(e) Additions to existing structures provided that the addition will not result in an increase of more than:

(1) 50 percent of the floor area of the structures before the addition, or 2,500 square feet, whichever is less; or

(2) 10,000 square feet if:

(A) The project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and

(B) The area in which the project is located is not environmentally sensitive.

Thus CEQA guidelines establish categorical exemptions for the minor alteration of facilities used to provide utility service and minor additions to existing facilities, the exact situation that we will generally have as California deploys broadband over power lines. As a result, if the Commission were to subject these individual transactions to a CEQA review, the result would be nothing more than a paper-pushing exercise in which the Commission would, after a review, inevitably conclude that these activities qualify for a categorical exemption.

Therefore, pursuant to § 853(b), we exempt from § 851 and any further conditions those transactions that can be accomplished by the use or modification of “existing facilities,” such as the use of existing electrical underground or overhead lines, or the placement of couplers, load monitoring devices, and equipment on existing poles or in existing buildings. As a result of the use of § 853(b) exemption, this Commission will not be reviewing these individual transactions and therefore the Commission’s requirement of a CEQA review is not triggered.

Moreover we note that the Commission already has many environmental protections already in place relating to utility wires and infrastructure. Thus, BPL equipment must be installed in or on existing utility structures consistent

with any and all applicable existing environmental mitigation measures, particularly those measures applicable to the utility infrastructure on which it is constructed or installed.⁴⁸

To complete our discussion of categorical exemptions, we note that grants of these exemptions generally have limits. For example, pursuant to CEQA Guideline 15300.2 and G.O. 131-D parameters for electric utilities, categorical exemptions do not apply when any of the following conditions occur: 1) there is a reasonable possibility that the activity may have a significant effect on an environmental resource of hazardous or critical concern; 2) the cumulative impact of successive projects of the same type in the same place, over time, is significant; or 3) there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

Since the protection of the environment remains a primary goal of this Commission, we will impose as an § 853(b) condition that the Commission conduct a CEQA review of all those BPL transactions that do not qualify for a categorical exemption. Specifically, we will require that the Commission conduct a CEQA review of those BPL transactions that can result in trenching, excavation, boring or drilling, or other digging. We note that we continue to exempt these transactions from all the other conditions of § 851 pertaining to Commission review of the financial transaction, but we subject these transactions to a CEQA review.

⁴⁸ According to Current, “BPL deployments simply involve placements of equipment on existing utility infrastructure...BPL involves no trenching or other activities which might trigger CEQA.” (Current Reply Comments, pp. 11-12.)

Finally all discussion of BPL transactions in the OIR and pleadings related to leases or other agreements for use of utility-owned infrastructure. No sale of utility assets was discussed. We therefore find no reason to exempt the sale of utility assets related to any BPL transaction from § 851 under this § 853(b) exemption. Should any utility wish to sell utility assets for BPL purposes, approval for such sales must be sought via a § 851 application.⁴⁹

C. Process

In the OIR, we discussed the use of an advice letter process for approval of utility leases or other financial arrangements with a BPL company. (OIR, p. 10.) We recognize, however, some problems with the use of an advice letter. For example, if an advice letter is protested, that may require the issuance of a Commission Resolution.⁵⁰ A contested advice letter resulting in a Commission Resolution raises a number of the same concerns raised by an application under § 851, such as triggering potentially lengthy revenue allocation and CEQA issues.

The Commission has no interest in further litigation and review of transactions that are consistent with this decision. Accordingly, we are not going to require the filing of an advice letter for approval of utility/BPL contracts. We do, however, believe it is important for this Commission to have notice of the existence of such a contract. Accordingly we will require utilities to provide the Directors of the Telecommunications Division and Energy Division notice of any

⁴⁹ An exception to this requirement, relating to SDG&E's possible transfer of the benefits of certain shareholder-funded development of BPL to a utility BPL affiliate, is discussed below.

⁵⁰ Given the number of parties and range of positions in this proceeding, it is quite possible that there may be protests to advice letters seeking approval of utility contracts with BPL providers.

lease or other financial arrangement with a BPL company, including the name of that company, the nature of the services to be provided, and date entered.

Should any such lease or other contract not be disclosed, or otherwise be inconsistent with this decision, this Commission, may open an OII for violation of this decision. Should any utility object to using this process for a particular transaction, the utility may submit an application to the Commission under Public Utilities Code § 851.

X. Other Issues

A. Disabled Access

Disability Rights Advocates argues that public rights-of-way need to remain accessible, and the Commission should ensure that BPL deployment does not result in obstruction of rights-of-way. (DRA Opening Comments, pp. 2-3.)

As an example, Disability Rights Advocates cites the digging up of sidewalks.⁵¹

To the extent that the utility or the BPL provider needs to access existing facilities, whether underground (e.g., vaults) or above ground (e.g., poles), the responsible companies must maintain rights of way or alternative paths of travel that are accessible for people with disabilities, as requested by DRA.

B. Health Effects

CARE's comments focused on the biological effects of radio frequency radiation, and possible health impacts of BPL. (CARE Opening Comments, pp. 1-8.) CARE claims that there may be adverse health effects from BPL and that evidentiary hearings are therefore warranted. (*Id.*, pp. 4-8.)

⁵¹ The record in this proceeding, however, does not support the need for the BPL provider to dig up sidewalks or anywhere else, and as described above, no such digging is authorized by this Decision.

SDG&E responded by noting that the FCC has exercised jurisdiction in the area of the potential health effects of radio frequency radiation, and argued that CARE should address its concerns to that agency. (SDG&E Reply Comments, pp. 15-17.) CTIA also contended that the issues identified by CARE are subject to exclusive federal regulation by the FCC, and accordingly this Commission's ability to consider such issues is preempted by federal law. (CTIA Reply Comments, pp. 1-2.) CTIA further added that CARE's claims of adverse health effects are unfounded. (*Id.*, pp. 2-4.)

SDG&E and CTIA appear to be correct that the health effects of radio frequency radiation is an issue generally subject to federal, rather than state jurisdiction.⁵² We note that the FCC, as the agency that authorizes and licenses transmitters and facilities that generate radio frequency radiation, has addressed the potential biological effects of radiofrequency electromagnetic fields through technical bulletins.⁵³ Accordingly, we do not address the issue here, and we do not reach the substantive issue of whether there are potential health effects from the deployment and use of BPL.

XI. Category and Need for Hearing

The Commission preliminarily categorized this proceeding as quasi-legislative, and preliminarily determined that hearings were not necessary.

⁵² CARE was provided an opportunity to respond to CTIA's jurisdictional arguments, but was largely unable to do so. (PHC Transcript, p. 25.)

⁵³ For example, see Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields, OET Bulletin 65, Edition 97-01, (rel. August 1997) and Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields, OET Bulletin 56, Fourth Edition, (rel. August 1999).

Based on the record, we affirm that this is a quasi-legislative proceeding, and that hearings are not necessary.

XII. Assignment of Proceeding

Commission President Michael R. Peevey was the Assigned Commissioner for this proceeding, but as of January 19, 2006, Commissioner Rachelle B. Chong became the Assigned Commissioner for this proceeding. ALJ Peter Allen is assigned to this proceeding.

XIII. Comments on Draft Decision

The draft decision of Commissioner Chong in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed _____.

Findings of Fact

1. BPL systems use electric power lines to carry high-speed data signals to neighborhoods.
2. BPL data transmit at a much higher frequency than electricity, so the BPL signal can occupy the electric wires without interfering with electric transmission.
3. A variety of BPL technologies have developed to address the potential of the power delivery system interfering with the BPL signal.
4. BPL has the potential to provide many benefits, including increased broadband competition, additional access to broadband, and cost savings to electric customers through “smart grid” applications.
5. Technical and economic constraints may initially limit the potential of BPL to serve dispersed populations in rural areas.
6. The FCC October 14, 2004 Report and Order on BPL encouraged “rapid development of all broadband technologies, including BPL.”

7. The NARUC BPL Task Force in a February 2005 report encouraged states to tailor appropriate regulatory roadmaps for the implementation of BPL.

8. An Electric Power Research Institute (EPRI) BPL White Paper notes regulatory action or inaction could have a significant impact on the business case of BPL.

9. SDG&E began its pilot program on September 1, 2005.

10. The regulatory framework in this decision is intended to protect ratepayers from risks associated with BPL investment, protect the reliability and safety of the electric system and provide incentives for utilities to encourage BPL development.

11. In a landlord-tenant model for BPL, an energy utility acts as the owner of power lines and a third party provides the BPL service.

12. Under the landlord-tenant model, a utility and a third-party BPL provider negotiate a contractual arrangement in which the BPL provider obtains access to the utility infrastructure.

13. The Commission has chosen to allow regulated affiliates to have unregulated affiliates subject to affiliate transaction rules.

14. The rules adopted by the Commission in OIR 92-08-008 and D.93-02-019 are rules governing the reporting of transactions between electric, gas, and telephone utilities and their affiliates.

15. BPL is a communications platform that does not provide products that use electricity, or services that relate to the use of electricity.

16. Providers of DSL that are affiliated with telecommunications utilities are not subject to the Energy Affiliate Transaction Rules.

17. Ratepayer dollars should not be invested in risky emerging technologies.

18. Shareholders and third parties will not assume the risks of pursuing BPL deployment without some expectation of rewards.

19. Even if utility shareholders are not investing in the BPL system, shareholders could still incur financial risks related to BPL.

20. Insulating ratepayers from financial risk is an essential objective.

21. Providing direct financial benefits to ratepayers is only desirable to the extent that shareholder incentives to pursue BPL are not significantly weakened.

22. SCE proposes applying its existing revenue-sharing mechanism for OOR, with a 90/10 shareholder/ratepayer split for an active service and a 70/30 shareholder/ratepayer split for a passive service.

23. SCE's OOR mechanism (adopted in D.99-09-070) protects ratepayers from financial risk.

24. In D.98-10-058, Appendix A, or ROW Order, the Commission has established rules governing access to public utility rights of way and support structures by telecommunications carriers and cable TV companies.

25. An essential element of the ROW Order is the requirement that a utility not discriminate in its fees for pole attachments.

26. The ROW Order describes the methodology for determining fees for pole attachments.

27. Electrical equipment problems, unrelated to BPL, may be identified in the process of installing a BPL system.

28. The safety and reliability of the electric delivery system is a principal concern of the Commission.

29. BPL poses unique safety issues since it is attached directly to energized electric wires.

30. Utilities must determine whether BPL equipment can be installed on their system and the manner in which it will be installed and operated.

31. Pub. Util. Code § 851 protects the quality of utility service provided to ratepayers and protects ratepayers' investment in utility assets.

32. A lengthy § 851 proceeding would simply be inconsistent with our stated policy goal of not impeding in the rapid deployment of BPL technology.

33. The plain language of § 853(b) does not limit its application to extraordinary circumstances.

34. The Commission has granted a number of § 853(b) exemptions without any finding of extraordinary circumstances. In the following cases the granting of an § 853(b) exemption results from a policy determination from this Commission: D.05-07-039, D.05-06-016, D.04-03-020, D.02-10-008, D.05-10-013, D.02-01-055, and D.04-07-021.

35. The public interest is best served by the speed of deployment of BPL technologies, rather than by a lengthy review process of individual BPL-related transactions

36. CEQA guidelines 15301 grants a categorical exemption for the minor alteration of and additions to existing facilities of utilities and additions to exiting structures, the exact situation that we will have as California deploys broadband over power lines.

37. If appropriate alternatives are present, there is no need to require filing of an advice letter for approval of utility/BPL contracts.

38. The FCC authorizes and licenses transmitters and facilities that generate radio frequency radiation and has addressed the potential biological effects of radiofrequency electromagnetic fields.

Conclusions of Law

1. We should not preclude direct utility provision of BPL, but such service should be approved under existing Commission procedures.
2. It is reasonable to allow BPL services to be provided by independent third parties under landlord-tenant contractual arrangements with electric utilities.
3. It is reasonable to allow BPL services to be provided by affiliates of electric utilities.
4. The affiliate reporting requirements adopted by the Commission in OIR 92-08-008 and D.93-02-019 should be applied to transactions between an electric utility and BPL affiliate.
5. The direct provision of BPL services by a regulated electric utility is not governed by this decision and would be subject to existing Commission procedures.
6. Transactions between an electric utility and BPL affiliate should not be subject to the Commission's existing Energy Affiliate Transaction Rules.
7. Ratepayer funds should not be used to research, develop or operate a BPL system.
8. BPL expenditures should be financed only with shareholder or third-party funds, and all financial risks and rewards from BPL projects should accrue to the shareholders or third-party investors.
9. It is reasonable to allow a utility and BPL company to agree to appropriate terms for access to utility infrastructure in a manner that gives utility shareholders an incentive to enter into such negotiations.
10. A revenue-sharing mechanism for allocation of revenues received by a utility from a BPL provider should protect ratepayers from financial risk, align

shareholder risks and rewards, and provide direct financial benefits to ratepayers.

11. It is reasonable to apply the existing revenue-sharing mechanism for OOR as adopted in D.99-09-070.

12. The existing revenue-sharing mechanism for OOR should be adopted for all electric utilities for the treatment of any access fees that the utilities received in the context of BPL deployment.

13. A utility should not be permitted to discriminate or cross subsidize in its fees for pole attachments by BPL providers.

14. The Commission should not at this time adopt rules requiring entities that acquire BPL rights on a utility system to begin implementing BPL service within a certain period of time.

15. Pursuant to Pub. Util. Code § 853(b), it is reasonable to exempt BPL projects and transactions from Pub. Util. Code § 851.

16. As a result of the use of 853(b) exemption, this Commission will not be reviewing individual BPL transactions and therefore the Commission's requirement of a CEQA review is not triggered

17. CEQA guideline 15301 grants a categorical exemption to those limited BPL transactions where equipment is installed in or on existing utility structures as long as all the BPL-related construction and installation is performed consistently with any and all applicable existing environmental mitigation measures, particularly those measures applicable to the utility infrastructure on which it is constructed or installed.

18. Under Pub. Util. Code § 853(b), it is lawful for the Commission to subject BPL projects to specific conditions, even when exempted from Pub. Util. Code § 851.

19. It is reasonable to require a CEQA review of those BPL projects and transactions if and when such projects result in trenching, excavation, boring or drilling, or other digging.

20. No sale of utility assets with respect to a BPL transaction should be permitted under this § 853(b) exception.

21. Since it is important for this Commission to have notice of the existence of a BPL contract and its general terms, we will require utilities to provide the Telecommunications Division Director and Energy Division Director, notice of any lease or other financial arrangement with a BPL company, including the name of that company, the nature of the services to be provided, and date entered.

22. To the extent that a utility or BPL provider needs to access existing facilities, the responsible companies should be required to maintain rights of way or alternative paths of travel that are accessible for people with disabilities.

O R D E R

IT IS ORDERED that:

1. It is the policy of this Commission to encourage development and competition in the broadband market by providing regulatory certainty to California companies seeking to provide broadband over power lines (BPL).

2. Regulated California energy utilities are authorized to enter into contracts through which BPL service may be provided by independent third parties using energy utility infrastructure.

3. Affiliates of regulated California energy utilities are authorized to provide BPL service using energy utility infrastructure and shall at all times be subject to the Commission's affiliate reporting requirements in OIR 92-08-008 and D.93-02-019 as modified by any subsequent Commission decisions.

4. Transactions between an electric utility and BPL affiliate are subject to a standard of fair market value or rates adopted herein. When reporting affiliate transactions pursuant to OIR 92-08-008 and D.93-02-019, utilities shall report the methodology used to calculate fair market value.

5. The direct provision of BPL by a regulated utility, as a tariffed or non-tariffed service is not governed by this decision. Should a regulated energy utility wish to provide BPL service on a tariffed or non-tariffed basis it should seek Commission approval to do so under existing Commission procedure.

6. Regulated utilities in California are precluded from using ratepayer funds to research, develop or operate a BPL system unless the expenditures can be justified solely on the basis of utility benefits.

7. Fees received by a regulated utility from BPL providers (other than the standard pole attachment fees that flow through to ratepayers) are to be allocated under the revenue-sharing mechanism for other operating revenues (OOR) as adopted in Decision (D.) 99-09-070.

8. In installing a BPL system in connection with a regulated utility, costs directly related to the repair and maintenance of existing electrical equipment for the purposes of electric service reliability shall be allocated to electricity operations, while costs directly related to BPL installation or operation shall be allocated to the BPL operator.

9. Regulated electric utilities involved with BPL services are directed to continue to comply with the rules, requirements and standards promulgated by the Commission's General Order (GO) No. 95, which applies to the construction of overhead lines, and GO 128, which applies to the construction of underground electric supply and communication systems. If in the course of implementing BPL projects, utilities identify a need to revise applicable Commission rules or

General Orders, the utilities are encouraged to request appropriate relief from the Commission, and the Commission will address the request expeditiously. Utilities shall ensure that their compliance with the Commission's GO 95 and GO 128 and their setting and application of additional safeguards and conditions is performed in a competitively neutral manner with respect to other communications and information providers who seek similar access.

10. Pursuant to Pub. Util. Code § 853(b), we exempt from the requirements of Pub. Util. Code § 851 all BPL transactions. However, no sale of utility assets is permitted under this Section 853(b) exemption. BPL equipment subject to this exemption may only be installed in or on existing utility structures, and all BPL-related construction and installation must be performed consistently with any and all applicable existing environmental mitigation measures, particularly those measures applicable to the utility infrastructure on which the BPL is constructed or installed.

11. Pursuant to Pub. Util. Code § 853(b), we impose a condition on those transactions that result in trenching, excavation, boring or drilling, or other digging. Such transactions, albeit still exempt from § 851 reviews, must undergo a CEQA review and obtain approval from this Commission.

12. Utilities shall provide the Telecommunications Division Director and Energy Division Director notice of any lease or other financial arrangement with a BPL company, including the name of that company, the nature of the services to be provided, and date entered.

13. To the extent that a regulated utility or BPL provider needs to access existing facilities, whether underground or above ground, the responsible companies are directed to maintain rights of way or alternative paths of travel that are accessible for people with disabilities.

This order is effective today.

Dated _____, 2006, at San Francisco, California.